No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

CARROL LAMAR WIGINTON

VS.

UNITED STATES OF AMERICA, and
THOMAS ARTRU, Special Agent
Internal Revenue Service

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
Fifth Circuit
New Orleans, Louisiana

PETITION FOR WRIT OF CERTIORARI

GEORGE J. PARNHAM
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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

(1) Whether the rule announced in United States v. Davis, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981), that in order for a quasi-criminal/administrative subpoena to be enforced, inter alia, the government is required to make only a minimal showing of inconvenience if it were required to retrieve the information from its own archives, is inconsistent with Supreme Court cases holding that the information must not be in government possession at all. United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978).

(2) Whether a officer of a small or closely held corporation, for which the officer is the sole stockholder and one of a few officers, can be forced to produce incriminating personal and corporate documents, when the act of production must necessarily point to the officer as the person who produced the same. Seeking clarification of footnote 11 in Brasewell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), at N11.

LIST OF INTERESTED PERSONS

The following persons are interested parties:

Presiding Judge At Trial

The Honorable Walter S. Smith

Attorneys for Government

Mr. Harold O. Atkinson

Attorneys for Appellant

Mr. Lawrence E. Naiser (at trial)

Mr. George J. Parnham (at trial and on appeal)

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OPINIONS BELOW

The opinion by the Court of Appeals was unpublished, and is set out in Appendix "A." The order of the district court was also unpublished.

JURISDICTION

This is an appeal from a Internal Revenue Service Petition to enforce an administrative summons. At the conclusion of the judicial hearing, the appellant was ordered to comply with the summons as modified. The district court's ruling is a final and appealable judgment or order under 28 U.S.C. sec. 1921. See Reisman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964); United States v. Riewe, 676 F.2d 418 (10th Cir. 1982). The Court of Appeals affirmed the trial court's order on September 5, 1990. Appellant filed a motion for rehearing, which was overruled on October 2, 1990. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

26 U.S.C. 7605(b) provides:

> No tax payer shall be subject to unnecessary examination or investigation . . . (emphasis added).

STATEMENT OF THE CASE

This appeal lies from an administrative summons compelling the appellant to produce records from his corporation. The appellant is the chief stockholder, owner and employee of the corporation.

The United States Internal Revenue Service (I.R.S.) sought enforcement of its administrative summons in the federal district court. The appellant asserted the defenses of right against self-incrimination, and the fact that the information was already in the agency's possession. The district court granted the appellant's assertion of privilege as to any testimony, denied the privilege as to production of documents, and denied the appellant's defense that the documents sought were already in the agency's possession. These issues were raised in the Court of Appeals, and decided adversely to the appellant.

REASONS FOR GRANTING THE WRIT

I.

THE FIFTH CIRCUIT RULE THAT THE GOVERNMENT NEED NOT SHOW THAT THE REQUESTED DOCUMENTS ARE NOT IN ITS POSSESSION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT, AND THE DECISIONS IN OTHER CIRCUITS.

In United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) this Court laid down the rule that the courts will not enforce an administrative summons where, inter alia, the information is already in the government's possession. See also United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978).

The Fifth Circuit has virtually read this requirement out of existence, by inserting a rule of inconvenience. The Court has held that where no bad faith is shown by the appellant, the requesting agency need show no more than that it would be inconvenient for the agency to retrieve documents that are already within its possession. United States v. Davis, 636 F.2d 1028, 1034, (5th Cir. 1981), cert. denied, 454 U.S. 862 (1981); United States v. Linsteadt, 724 F.2d 480 (5th Cir. 1984).

The rule in Davis and Linsteadt cannot be squared with the terms of 26 U.S.C. 7605(b), which expressly prohibits unnecessary examination or investigations. The Fifth Circuit rule is also in direct conflict with this Court's decision in Powell, requiring a showing that the records are not already within the possession of the requesting agency.

Furthermore, Davis is inconsistent and in conflict with the decisions of the other federal jurisdictions, which require a a showing of more than inconvenience. St. German of Alaska Eastern Orthodox Catholic Church vs. United States, 840 F.2d 1087 (2nd Cir. 1988); Anaya vs. United States, 815 F.2d 1373 (10th Cir. 1987); United States vs. Reis, 765 F.2d 1094 (11th Cir. 1985); Ponsford vs. United States, 771 F.2d 1305 (9th Cir. 1985); United States v. Coppers & Lybrand, 550 F.2d 615 (9th Cir. 1977); United States v. Lask, 703 F.2d 293 (8th Cir.), cert. denied, 464 U.S. 829 (1983); United States vs. Community Federal Sav. & Loan Ass'n, 661 F.2d 694 (8th 1981); United States vs. Garden State Nat. Bank, 607 F.2d 61 (3rd 1979); United States vs. Richards, 631 F.2d 341 (4th 1980).

The rule in Davis is also in conflict with earlier Fifth Circuit decisions requiring a showing that the information possessed was not in already in the summoning agency's possession. See Stites v. I.R.S., 793 F.2d 618 (5th Cir. 1986); United States vs. Grayson County State Bank, 656 F.2d 1070 (5th Cir. 1981); United States v. Davis, 636 F.2d 1028 (5th Cir.), cert. denied, 454 U.S. 862 (1981); United States v. Greenleaf, 546 F.2d 123 (5th Cir. 1977).

This writ would be an excellent opportunity for this Court to further clarify the rule in Powell concerning the requirement that the documents requested by the investigating agency must not be in that agency's possession before its administrative summons would be enforced by court order.

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT ISSUE OF LAW IN RULING THAT THE APPELLANT, A SOLE PROPRIETOR, HAS NO FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION RELATING TO THE ACT OF PRODUCING PERSONALLY INCRIMINATING CORPORATE DOCUMENTS.

The rule is established that the recipient of a subpoena may assert his personal Fifth Amendment right against self-incrimination. In Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988), it was established that the right does not generally apply to corporate custodians. However, this Court also noted:

> We leave open the question whether the agency rational supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records. 108 S.Ct. at 2295, N11.

The record is undisputed that the appellant was the chief stock holder and employee of his small corporation. Appellant's situation fits into the exception contemplated by footnote 11.

This writ would be an excellent opportunity to expand and delineate under what circumstances the production of business

records from a small corporation would necessarily incriminate the custodian\employee\stockholder of a small corporation.

CONCLUSION

The record shows that the documents sought by the I.R.S. were already in the agency's possession, and that a jury would necessarily infer that the appellant produced the documents to any investigative agency. This Court should grant appellant's petition for writ of certiorari, order full briefs on the merits, and set this matter down for oral argument.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX "A"

Opinion by the Court of Appeals

IN THE UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8099
Summary Calendar

UNITED STATES OF AMERICA AND THOMAS ARTRU,
Special Agent, Internal Revenue Service,

Plaintiffs-Appellees,

versus

CARROL LAMAR WIGINTON,
President, Mathematical Research, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-89-CV-979)

(September 5, 1990)

Before JOHNSON, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of the Internal Revenue Service ("I.R.S.") investigation of the individual income tax liabilities of Carrol Lamar Wiginton ("Wiginton") for the years 1982, 1983, 1984, 1985, and 1986. In furtherance of this investigation, Special Agent Thomas E. Artru ("Agent Artru") issued an administrative summons to Wiginton in his capacity as president of Mathematical Research, Inc. This summons, dated December 12, 1988, required Wiginton to give testimony and produce for examination certain books, records and documents of the corporation for the period January 1, 1982 through December 31, 1986.[1] After Wiginton refused to comply with the summons, the United States of America filed a petition in the Unites States District Court for the Western District of Texas against Wiginton seeking to enforce the summons. The District Court issued an order directing Wiginton to comply with the summons or to show cause for noncompliance at a show cause hearing. Wiginton again failed to comply and the District Court held a show cause hearing on December 11, 1989.

During the show cause hearing, Wiginton responded to each question by invoking his Fifth Amendment right against self-incrimination. Following the hearing, the District Court issued an order requiring Wiginton to produce the records and materials requested in the summons.[2]

Wiginton timely filed a notice of appeal and the District Court granted Wiginton's motion to stay pending appeal.

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1. The summons specified the following documents to be produced:

1. General ledger, general journal, cash receipts and cash disbursement journals and ledgers and subsidiary ledgers.
2. Stock records, corporate minute book, articles of incorporation (including amendments) and corporate bylaws.
3. Forms W-2 and 1099.
4. Workpapers, schedules, analyses and any other documents used to prepare the corporate income tax returns.

2. The District Court Refused to require Wiginton to testify and this issue is not raised in this appeal.

II. DISCUSSION

Wiginton advances two points of error. First, Wiginton argues that judicial enforcement of the administrative summons is improper because the Government had failed to show that the information sought was not already in the Government's possession. Second, Wiginton argues that his constitutional right against self-incrimination protects him from producing the requested documents. Rejecting both these arguments, we affirm the enforcement order of the district court.

A. Availability of the Requested Information

The enforcement of a summons is controlled by United States v. Powell, 379 U.S. 48 (1964). Under *Powell*, to obtain enforcement of a summons, the Government must make an initial showing that (1) the investigation will be conducted pursuant to a legitimate purpose, (2) the inquiry may be relevant to that purpose, (3) the information sought is not already within the possession of the Commissioner of Internal Revenue, and (4) the administrative steps required by the Internal Revenue Code have been followed. *Id.* at 57-58.

As this Court noted in United States v. Davis, 636 F.2d 1028, 1034, (5th Cir. 1981), cert. denied, 454 U.S. 862 (1981), the Government need only make a minimal showing of the Powell requirements by simple affidavit filed with the petition to enforce by the agent who issued the summons, as was done in this case. Once the Government has satisfied this minimal requirement, burden shifts to the summons either to disprove one of the four elements of the Government's prima facie showing or to demonstrate that judicial enforcement of the summons would otherwise constitute an abuse of the court's process. Davis, 636 F.2d at 1034.

Wiginton challenges enforcement of the summons on the ground that the third Powell requirement has not been met. Wiginton claims that enforcement should be denied because the Government already has possession of the documents sought. Since some of the documents requested would be on file with the I.R.S. if the corporation had complied with the law, Wiginton contends that he should not be required to produce these documents. We reject this contention.

This Court has narrowly construed the "already possesses by government" defense enunciated by *Powell* as merely a "gloss on [26 U.S.C.] Sec. 7605 (b)'s prohibition of 'unnecessary summonses'." *Id.* at 1037. Thus, defense is limited to those instances where the summons is unnecessary or brought to harass the taxpayer. United States v. Linsteadt, 724 F.2d 480, 484 (5th Cir. 1984).

As this Court ruled in Davis, although the Internal Revenue service may have "possession" of a particular form somewhere in its files, enforcement of the summons is still appropriate if the large number of forms submitted makes it impracticable to retrieve a form relating to a particular individual. Davis, 636 F.2d at 1037. In the instant case, Agent Artru testified that some of the documents requested (Forms W-2 and 1099) may indeed be located in the I.R.S. Center in Austin, Texas, but "those items are not easily retrievable on an individual basis, because of the volume and number of documents are not practically retrievable, therefore, they are not available possessed by the I.R.S. See Linstead, 724 F.2d at 484. Furthermore, there is no indication that the I.R.S. already possesses the other documents listed in the summons, for example, the corporation's ledgers, journals, stock records, minute books, etc.

Finally, we perceive no reason to believe that the request in the summons to produce these documents constitutes and "unnecessary" or "harassing" request requiring non-enforcement of the summons. Thus, because "the bulk of the materials summoned is not demonstrably in the possession of the IRS is small, "Davis, 636 F.2d at 1038, we find that the Powell requirements for enforcement have been met.

B. Fifth Amendment Privilege

Wiginton next claims that his constitutional right against self-incrimination bars enforcement of the summons. Wiginton argues that producing the requested documents would personally incriminate him.

It is clear that corporations are not protected by the Fifth Amendment and the contents of subpoenaed business records not privileged. Braswell v. United State, 487 U.S. 99, 102 (1988). Accordingly, the Supreme Court has ruled that the records custodian for a corporation cannot assert his Fifth Amendment privilege to resist a subpoena for corporate

records. *Id.* at 109. This limitation is based on "the notion that a corporate custodian acts as an agent and not an individual when he produces corporate records in response to a subpoena addressed to him in his representative capacity." *Id.* at 118 n.11.

In a footnote to *Braswell*, the Supreme Court left open the question whether a custodian of corporate records could be compelled to produce corporate documents where "the custodian is able to establish, by showing for example he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records." *Id.* Wiginton seizes upon this language and attempts to show that a trier of fact would inevitable conclude that he produced the requested documents. But even if the Supreme Court intended to establish a privilege in those circumstances, Wiginton has failed to show that his situation is similar. Wiginton has not shown that he is the sole employee or sole officer of the corporation. Furthermore, we find that a trier of fact would not inevitable conclude that Wiginton produced the documents; since the Government has not sought to require Wiginton to authenticate the documents, a trier of fact would reasonable conclude that the documents were produced by another agent or employee of the corporation. Thus, Fifth Amendment right against self-incrimination does not protect Wiginton from enforcement of a summons directed at him as a representative of the corporation to produce corporate documents.

III. CONCLUSION

Rejecting Wiginton's claims on appeal, the enforcement order of the district court is affirmed.

AFFIRMED